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COORDINATING IMMIGRATION OF GERMAN SCIENTISTS

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Coordinating Immigration of
German Scientists

In drafting the SWNCC directives an attempt was apparently made to distinguish between immigration of German specialists for "national security" and their immigration for the "national interest." The former phrase was used to designate the program under the Army and Navy sponsorship, given to JIOA for implementation. The latter, under so-called civilian sponsorship, was given to the Department of Commerce for implementation. The draftsmen, perhaps, had in mind that the former program was in the nature of a denial program to be accomplished by immigration, whereas the latter involved the utilization of an opportunity to salvage useful specialists. Experience has already indicated the limits of the former program. While the State Department has not been officially a participant in the discussions under the Commerce program, it is becoming increasingly clear that that program too is much more difficult than its authors assumed, and that much clarification is necessary in so far as the Department of State and the Foreign Service may be called upon for action. The situation, moreover,

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moreover, is destined to become even more complicated by individual applications for visas, many under the sponsorship of isolated individuals and institutions in the United States. An overhauling of the entire subject of German immigration, within which the immigration of specialists must be coordinated, is overdue.

A. The Commerce Directive

An analysis of the Commerce directive of SWNCC ("Appendix C") discloses the following salient factors:

1. The specialists involved follow, in order of priority of immigration, the specialists chosen under Appendix "B", the JIOA program. Paragraph 8 of Appendix "C" states: "Requests for specialists in the interest of national security will be given priority over other requests."

2. The fundamental notion is that the specialists brought over will be exploited for the common benefit of the American public. Thus paragraph 3 provides: "The results of the specialists' research will, as far as possible, be made available to the public. For this reason, specialists will be employed primarily by government departments or agencies and non-profit institutions of learning or research." Nevertheless, it is envisaged that

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private enterprises will also make requests. Thus paragraph 4 states: "When employment by private business enterprise is requested, such employment will normally be required to be undertaken in cooperation with other interested enterprises, possibly by the establishment of a university fellowship, or by an annual or term grant to a university. Exceptions to this principle will be made only when such arrangements are clearly not practicable. In all cases, appropriate arrangements with the employer will be required to assure that the public interest is protected, for example, assurance that any resulting patents will be freely licensed, on a non-exclusive basis, at reasonable royalties."

3. Specific provision is made for the control of the specialists by contract.

a. Paragraph 5 provides: "Employers, other than government departments and agencies, of specialists will be required

"a. to engage their services on the basis of suitable contracts as a means of binding and protecting the specialists;

"b. to obtain the sponsorship of a government department or independent governmental agency."

b. Where the government is the sponsor (presumably whether on its own account or on account of a

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private employer) it must certify to the Department of Commerce "the terms and conditions of the contract or arrangement," etc.

In connection with the employment in the United States, the Department of Commerce is required "to establish," through its agency for the purpose, "that the proposed terms and conditions of the contract or other arrangement for employment in this country, of the specialists in question, are fair and reasonable and that the request for his admission into this country is consistent with this policy and with existing law."

B. Differences Between Appendices "B" and "C"--Joint British Exploitation.

The foregoing factors present problems of coordination when read together with Appendix "B". Among these are:

1. A specialist brought in under Appendix "B" would receive an immigration visa for permanent entry but would receive a contract for a limited time. In practice, it appears that the Army and Navy contracts on which such specialists could work are of limited duration and it is the expectation of the Armed Services that these specialists would sooner or later become available to private employment.

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employment. Yet when so turned over to private industry-- which might be after a few months--the individuals involved could keep their research, patents and know-how to themselves, and the public would receive no benefit such as is contemplated under Appendix "C".

2. The contracts under Appendix "B" are not required to bind or protect the specialists (presumably in the public interest), while the contracts under Appendix "C" must be of such character.

3. The way is thus open for evasion of the policy of Appendix "C". Immigrants brought in under Appendix "B" would end up very quickly with a private firm free of the encumbrances of the Commerce program. This is not an academic possibility but a very practical one in view of the lack of a really long-range exploitation program for a great number of the specialists whom the Armed Forces have in mind for immigration. The Navy, for example, has proposed informally that no exploitation be required of immigrant specialists and that in any event the required exploitation be of very limited duration. This also, in large measure, appears to be the case with respect to the Air Forces while the rest of the War Department has not committed itself.

4. Other difficulties are created by the program of cooperation with the British by which, where both we and the British

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the British want the same scientist, arrangements may be made for consecutive exploitation. While there may be more in the British proposal than meets the eye, it is quite obvious that the British purport to treat the specialists they bring in as if they were in continuous government custody, to be observed, misused, reported upon and, if necessary, expelled at any time. Our programs, on the other hand, involve an avoidance of continued governmental responsibility and the grant of immigrant status at the earliest opportunity.

C. Coordination Steps.

The coordination of the program would involve the following steps:

1. The whole problem of German immigration must be treated as a single problem. This means the creation of priorities for different types of immigrants within the quota, provision or consideration of the possibilities of strict control of visa entrants whether as immigrants or as visitors, and their activities in the United States, and the granting of any visa status only after the clearest analysis of the security factors.

2. The security factors determinative of any visa status, whether for permanent immigration or temporary visit, are:

a. Whether

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a. Whether the scientists in question may engage here in activities evasive of the Allied Control Council's and the United States policies for the destruction of German war potential.

b. Whether the activities of the applicant might involve, apart from the foregoing, elements of extension of Pan-Germanism within the United States, insidious infiltration of our economy and other forms of danger characteristic of German expansion activities in the pre-war period.

3. The military custody program should be expanded in so far as possible to take care of the denial aspects. This would have the effect of permitting joint exploitation of the British without the encumbrance of immigrant status to which the latest SWNCC paper, 257/16, refers.

a. Provision might well be made by the Armed Forces for the maintenance in the United States under military custody of wives and dependents.

b. The entire legal validity of the military custody theory would have to be established.

c. Provision would have to be made for the validity of such custody after the emergency passes. This is a problem which the peacemakers will have to bear in mind.

D. Legal

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D. Legal Aspects of Military Custody Status.

The immigration laws provide, in general, that no entry into the United States can take place on the part of an alien except through the Immigration authorities and pursuant to visas, unless specific arrangements are made for waiver. Section 30 of the Act of June 28, 1940 (8 U.S.C. Section 451), provides: "Any alien seeking to enter the United States who does not present a visa (except in emergency cases defined by the Secretary of State), a re-entry permit, or a border crossing identification card, shall be excluded from admission to the United States."

It appears that the arrangements made by the War Department with the Departments of State and Justice (represented respectively by Mr. Alexander of the Visa Division and Mr. Sharghnessy of the Immigration Service) for the entry of the German specialists now in this country, were based on the premise that they have not legally entered within the meaning of the immigration laws, but were rather detainees in military custody, and otherwise excludable. Mr. Alexander states that this theory derives from the practice sanctioned by Kaplan v. Tod 267 U.S. 228 (1925). That case established the doctrine that excludable aliens permitted to stay here in custody

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conditionally could not claim to have entered the United States under the immigration laws whether as immigrants or non-immigrants. They are described as assimilated into the category of prisoners of war. Should the specialists, therefore, leave the custody whether with or without the consent of the military authorities, the specialists would become liable to arrest and deportation by the Immigration authorities.

It must be conceded that a distinction of fact exists between the cases. In the Kaplan type of situation, an excludable alien succeeds in staying here only by necessity; having arrived physically in United States territory he must be expelled and he is permitted to stay only pending the availability of means to perfect his expulsion--in the Kaplan case, World War I had intervened between the arrival and the decision to expel, and in similar cases the entrant may be arguing his case with the Immigration authorities and is permitted to stay only pending the decision. Here, however, the intention on all sides is different, for the entrant is expected to work here and to stay here either as long as he is needed or wishes to stay for that purpose. The present case, in other words, is like the Kaplan case only by extending a fiction. Nevertheless, it remains to be seen whether the

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the distinction in fact is also a distinction in law.

The power of the military authorities to maintain these specialists in custody is, therefore, on this theory not determinative. It may be said, however, that some doubt exists with respect to whether these specialists can be called prisoners of war in any international law or treaty sense, or within the surrender terms applicable to Germany. The military surrender referred only to members of the Armed Forces of Germany and called for a general instrument of surrender to be imposed by or on behalf of the United Nations applicable to Germany and the German Armed Forces as a whole. (Act of Military Surrender May 8, 1945.)

The document applicable to "Germany as a whole" is that of June 5, 1945, which provided that the occupying governments assumed all the powers possessed by the German Government, etc. While this document declared only members of the Armed Forces to be prisoners of war, it provided also for additional "requirements arising from the complete defeat of Germany," which "the German people shall carry out unconditionally." Among these provisions is the prohibition of certain types of research, etc.

It seems

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It seems plausible to argue that the continued detention of persons who are dangerous if loose is justifiable under the surrender documents. Of course, a subsidiary question might be discussed of whether under these documents the United States is free to act alone; but the point is not labored since the United States is presumably free to act alone within its own zone, and no courts in the United States--it may be assumed--would question whether an Allied Control Council decision is necessary before the United States Occupation authorities can remove from Germany, or permit to leave Germany temporarily, any persons whose activities within the zone the United States Government is obligated to control.

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